UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

MARTIN A. LEHMAN,

Plaintiff,

-against-

MEMORANDUM OF DECISION AND ORDER

CV 99-6517 (ADS)

BARBARA KORNBLAU, individually and in her official capacity as an Assistant District Attorney of Nassau County, DENIS E. DILLON, individually and in his official capacity as District Attorney of Nassau County, FRANCIS D. QUIGLEY, individually and in his official capacity in the Nassau County District Attorney's Office, ROBERT L. EMMONS, individually and in his official capacity in the Nassau County District Attorney's Office, RODOLFO BARRIO, individually and in his official capacity as a Nassau County Police Officer, JOSEPH MOLINELLI, J. ALGERI, individually and in his offical capacity as a Nassau County Police Officer, GEORGE V. CATS, individually and in his official capacity as a Nassau County Police Officer, MARY FLYNN, individually and in her official capacity as a United States Postal Inspector, GEORGE ROBERT, SCOTT JAFFER, LINDA FARRELL, PHILIP T. BLESSINGER, DAPHNE J. STASCA, ATLANTIC MUTUAL INSURANCE COMPANY, CIGNA INSURANCE COMPANY, ZURICH AMERICAN INSURANCE COMPANY, NATIONAL

INSURANCE CRIME BUREAU, SUNNYDALE FARMS COMPANY, COUNTY OF NASSAU and UNITED STATES POSTAL SERVICE.

Defendants.

----------X

APPEARANCES:

MARTIN A. LEHMAN
Plaintiff Pro Se
308 Elm Street
West Hempstead, New York 11552

ALFRED F. SAMENGA
OFFICE OF THE COUNTY ATTORNEY,
COUNTY OF NASSAU
Attorney for Defendants Barbara Kornblau, Denis Dillon, Francis D. Quigley, Robert L. Emmons, Rodolfo Barrio, J. Algieri, George V. Cats and County of Nassau
Nassau County Executive Building
One West Street
Mineola, New York 11501-4820
By: Louis F. Chisari, Deputy County Attorney

JOSEPH MOLINELLI
Defendant Pro Se
27 Arrowhead Road
Shirley, New York 11967

LORETTA LYNCH
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
Attorney for Defendants Mary Flynn, John Doe and United States Postal Service

147 Pierrepont Street
Brooklyn, New York 11201
By: Paul Kaufman, Assistant United States Attorney

STOCKMAN WALLACH LENTZ & GARNELL LLP
Attorneys for Defendants George Roberts, Scott Jaffer and Atlantic Mutual Insurance Company
10 East 40th Street
New York, N.Y. 10016-0355
By: Roger A. Goodnough, Esq. Of Counsel

LINDA FARRELL
Defendant Pro Se
50 Popular Drive
Morris Plains, New Jersey 07950

SAVONA & SCULLY
Attorneys for Defendants Philip T. Blessinger, National Insurance Crime Bureau, and CIGNA Insurance Company
111 Broadway, 12th Floor
New York, N.Y. 10006
By: Joseph F. X. Savona Esq., Of Counsel
Raymond D'Erasmo, Esq.

GOLDMAN & GROSSMAN
Attorney for Defendants Daphne J. Stasca and Sunnydale Farms Company
55 John Street 3rd Floor
New York, N.Y. 10038
By: Eleanor R. Goldman, Esq. Of Counsel

LESTER SCHWAB KATZ & DWYER
Attorneys for Defendant Zurich American
Insurance Company
120 Broadway
New York, N.Y. 10271
By: Thomas A. Catalano, Esq. Of Counsel

SPATT, District Judge:

This lawsuit rises out of a claim by Martin A. Lehman (the "plaintiff," or "the doctor"), an orthopedic surgeon in Nassau County, that the defendants, Barbara Kornblau ("Kornblau"). Denis Dillon ("Dillon"), Francis D. Quigley ("Quigley"), Robert L. Emmons ("Emmons"), Rodolfo Barrio ("Barrio"), J. Algieri ("Algieri"), the County of Nassau ("County") (collectively, the County defendants"), Mary Flynn ("Flynn"), John Doe ("Doe"), the United States Postal Service ("Postal Service") (collectively, the "Postal Service defendants"), George Roberts ("Roberts"), Scott Jaffer ("Jaffer"), the Atlantic Mutual Insurance Company ("Atlantic") (collectively, the "Atlantic defendants"), Philip T. Blessinger ("Blessinger"), the National Insurance Crime Bureau ("NICB") (collectively, the "NICB defendants"), Daphne J. Stasca ("Stasca"), Sunnydale Farms Company ("Sunnydale") (collectively, the "Sunnydale defendants"), Zurich American Insurance Company ("Zurich"), CIGNA Insurance Company ("CIGNA"), Joseph Molinelli ("Molinelli"),and Linda Farrell ("Farrell") conspired to maliciously prosecute him for insurance fraud. Presently before the Court are motions to dismiss the complaint by the County defendants, the Postal Service defendants, the

Atlantic defendants, the Sunnydale defendants, and Zurich.

1. BACKROUND

The following facts are taken from the complaint. In December 1995, defendant Kornblau, an Assistant District Attorney ("A.D.A.") in the Nassau County District Attorney's Office ("D.A.'s Office") held a meeting where a plan to entrap and maliciously prosecute the plaintiff was hatched. The meeting was held under the supervision of Dillon, the Nassau County District Attorney, A.D.A. Quigley, and A.D.A. Emmons, all of whom were employed by the County. Other people who attended the meeting included: Barrio who is a detective in the Nassau County Police Department, Molinelli, who the plaintiff contends was a convicted felon and confidential informant, Jaffer, who is a Worker's Compensation Coordinator at Atlantic, Stasca, who is an officer at Sunnydale, and an unnamed representative of the NICB. The plaintiff alleges that at this meeting, Molinelli and Flynn agreed to pretend to be patients who had suffered physical injuries at work.

On December 22, 1995, Molinelli saw the doctor and told him that he had suffered injuries on the job at Sunnydale. Molinelli complained of pain in his back, neck and right knee. The doctor perfomed a physical examination, took x-rays, gave Molinelli a muscle relaxant, and advised Molinelli to start physical therapy. Molinelli returned to the doctor's office on several occasions. He told the doctor that was still in pain and asked the plaintiff for disability notes.

On April 26, 1996, Molinelli returned to the plaintiff's office with Farrell, who is a medical case worker for worker's compensation claims at Atlantic. The doctor told Molinelli and Farrell that Molinelli could return to light duty. Farrell responded that Molinelli's job did not entail and light duty.

The plaintiff alleges that Flynn participated in the conspiracy by claiming that she had been hit by a bus on March 14, 1996, and complaining to the doctor about injuries to her back and left hip. The plaintiff alleges that Postal Service supervisor John Doe approved Flynn's conduct.

On May 7, 1996, Barrio visited the doctor and told the doctor that his name was Joseph Batista, he worked at Sunnydale, and he had injured his back and neck at work the previous day. On September 11, 1996, Barrio returned to the doctor's office with Farrell. The doctor told Barrio that he should try to return to light work, but Farrell told the doctor that no such work was available. The doctor told Barrio that he should return to his usual work.

Although the complaint is vague, the plaintiff seems to allege that Barrio committed perjury when he applied for a search warrant on May 16, 1997. The plaintiff also appears to claim that the D.A.'s Office suborned Barrio's alleged perjury by assisting him in preparing his warrant application.

The plaintiff was arrested on May 21, 1997, The same day, Dillon allegedly told Newsday, "Lehman, 64, a Wantagh orthopedist, is shown meeting with

an undercover operative who tells Lehman she was working despite being injured in an accident. You are not working as far as insurance is concerned, Lehman is heard telling the women without performing a physical examination. Lehman gave the woman a disability form, Dillon said" (complaint 66). The plaintiff contends that this statement was untrue, and that the D.A.'s Office was in possession of tapes that support his contention.

The doctor claims that Algieri and Cats participated in the conspiracy by supervising and approving Barrio's action and by monitoring and recording video and audio tapes. The plaintiff asserts that from the twenty-three videotapes that had been made in connection with the D.A.'s investigation, five did not contain any recorder images.

The plaintiff also contends that Blessinger, who is a "Special Investigator" with the NICB, also monitered the taping. The plaintiff further alleges that Blessinger telephoned the plaintiff's office impersonating Molinelli and accompanied Molinelli to the plaintiff's office on several occasions.

The plaintiff claims that the following defendants "participated in the conspiracy to setr-up, entrap and frame the Plaintiff to deprive him of his civil rights." Roberts, Jaffer, Atlantic, CIGNA, Zurich, NICB, Sunnydale, the County and the Postal Service.

The plaintiff also alleges that Barrio, Molinelli and Flynn committed perjury when they testified before the Grand Jury. According to the plaintiff, Barrio told the Grand Jury that he was out on disability from May 1996 through March 1997, and he never saw a doctor, other than the plaintiff, during that time (see complaint 56). The plaintiff contends that this testimony was untruthful, because Barrio used an alias to see three other doctors during this period (see complaint 57).

The plaintiff asserts that, in the Grand Jury, Molinelli testified that he did not complain of neck pain when he first visited the doctor he told the doctor. The plaintiff claims that this testimony was untruthful, because at the criminal trial, Molinelli told the jury that he had complained of neck pain during his first visit to the doctor's office.

The plaintiff claims that Flynn told the Grand Jury that she did not complain of pain when the doctor moved her leg and hip in a certain manner. According to the plaintiff, this testimony was false, because audio tape-recording of Flynn's first visit to the plaintiff's office indicates that she told the doctor that her hip did hurt when he moved her leg in a particular fashion.

The plaintiff states that on March 3, 1999, after an eight-week trial, a jury acquitted him of all charges. The plaintiff contends that during the trial, the "operatives" said that they never complained of pain, discomfort or disability during their visits to his office.

The plaintiff asserts seven causes of action. He contends:

FIRST CAUSE OF ACTION.....

71. Plaintiff was subject to a conspiracy to interfere with his civil rights in violation of 42 U.S.C. 1983 and 42 U.S.C. 1985 and 28 U.S.C. 1343.

SECOND CAUSEOF ACTION....

73. Plaintiff was subject to unwarranted search and seizure in violation of 42 U.S.C. 1983, 42 U.S.C. 1985 and 28 U.S.C. 1343 and the 4th Amendment of the Constitution of the United States of America.

THIRD CAUSE OF ACTION.....

75. Plaintiff was subjected to malicious intention to find probable cause to indict, legal advise to commit perjury in sworn affidavit and Grand Jury testimony and malicious prosecution in violation of 42 U.S.C. 1983, 42 U.S.C. 1985 and 28 U.S.C. 1343.

FOURTH CAUSE OF ACTION....

77. Plaintiff was subject under color of law to perjured testimony by law enforcement officers and a confidential informant under their control in violation of 42 U.S.C. 1983, 42 U.S.C. 1985 and 28 U.S.C. 1343.

FIFTH CAUSEOF ACTION.....

79. Plaintiff was subjected to malicious falsehood in press conferences and releases in violation of 42 U.S.C.1983, 42 U.S.C. 1985

and 28 U.S.C 1343.

SIXTH CAUSE OF ACTION.....
81. Plaintiff was subjected to loss of liberty, loss of ability to earn a living, unwarranted search and to spend huge sums of money to defend himself in a criminal prosecution in violation of 42 U.S.C. 1983, 42 U. S.C. 1985, 42 U.S.C. 1988 and 28 U.S.C. 1343.

SEVENTH CAUSE OF ACTION....
83. Defendants have acted under color of law pursuant to official policy on in conjunction with law enforcement officials in contravention of Plaintiff's constitutional and statutory rights as set forth, but not limited to, the Fourth and Fourteenth Amendments to the United States Constitution, as well as 42 U.S.C. 1983, 42 U.S.C. 1985, U.S.C. 1986 and 28 U.S.C. 1343.

(Complaint 71, 73, 75, 77, 79, 81,83).

Presently before the Court are the following motions: (1) The County defendants' motion to dismiss the complaint pursuant to Rules 12 (b)(1) and 12 (b)(6) of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."); (2) the Postal Service defendants' motion to dismiss the complaint pursuant to 12(b)(6); (3) the Sunnydale defendants' motion to dismiss the complaint pursuant to 12 (b)(6); (4) Zurich motion to dismiss the complaint pursuant to 12(b)(6); and (5) the Atlantic defendants' motion to dismiss the complaint

pursuant to Rules 12(b)(1) and 12 (b)(6).

II. DISCUSSION

A. STANDARD OF REVIEW

In addressing the defendants' motions, the Court is mindful that the plaintiff is proceeding pro se and that his submissions should be held "to less stringent standards than formal pleadings by lawyers." Hughes v. Rowe, 449 U.S. 5, 9, 101 S. Ct. 173, 176, 66 L.Ed. 2d 163 (1980 (per curiam) (quoting Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L.Ed. 652 (1972); see also Ferran v. Town of Nassau, 11 F.3d 1, 22 (2d Cir. 1993). The Court recognizes that it must make reasonable allowances so that a pro se plaintiff does not forfeit rights by virtue of his or her lack of legal training. See Traguth v. Zuck. 710 F.2d 90, 95 (2d Cir. 1983). Indeed, District Courts " should read the pleadings of a pro se plaintiff liberally and interpet them "to raise the strongest argument that they suggest." McPherson v. Coombe, 74 F.3d 276, 280 (2d Cir. 1999) (quoting Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994)). Nevertheless, the Court is also aware that pro se status "does not exempt a party from compliance with relevant rules of procedural and substantive law." Traguth, 710 F.2d at 95 (quoting Birl v. Estelle, 660 F. 2d 592, 593 (5th Cir. 1981)).

On a motion to dismiss for failure to state a claim, the court should dismiss the complaint pursuant to Rule 12(b)(6) if it appears beyond doubt that the plaintiff can prove no set of facts

in support of his complaint which would entitle him to relief. See King v. Simpson, 189 F.3d 284, 286 (2d Cir. 1999); Bernheim v. Litt, 79 F. 3d 318,321 (2d Cir. 1996). The Court must accept all factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. See Koppel v. 4987 Corp. 167 F. 3d 125, 127 (2d Cir. 1997). The issue to consider is not whether a plaintiff will ultimately prevail but whether a claimant is entitles to offer evidence to support the claims. See Villager Pond, Inc. v. Town of Darien, 56 F. 3d 375, 378 (2d Cir. 1995). The Court must confine its consideration "to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken." Leonard F. v. Israel Discount Bank of N.Y., 199 F. 3d 99, 107 (2d Cir. 1999); Hayden v. County of Nassau, 180 F. 3d 42, 54 (2d Cir. 1999).

Turning to 42 U.S.C 1983, the statue governing all of the plaintiff's claims, that Section provides, in relevant part, "every person who , under color of [state law] subjects, or causes to be subjected, any.... person within the jurisdiction [of the United States] to the deprivation of any rights, privileges or immunities secured by the Constitution or laws, shall be liable to the party injured in an action at law [or a] suit [in] equity." A violation is proven when " a person acting under colorof state law deprives a plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States." McDarby v. Dinkins, 907 F. 2d 1334, 1336 (2d Cir. 1990) (citing Parratt v. Taylor, 451 U.S. 527, 535. 101 S. Ct. 1908, 68 L.Ed2d 420

(1981). Thus, a Section 1983 claim has two elements: (1) the defendant acted under color of state law; and (2) as a result of the defendant's actions, the plaintiff suffered a deprivation of his rights ot privileges secured by the Constitution and laws. See Annis v. County of Westchester, 136 F. 3d 239, 245 (2d Cir. 1988); Eagleston v. Guido, 41 F. 3d 865, 872 (2d Cir. 1994).

The second requirement, that the plaintiff suffer a deprivation of his rights or privileges secured by the Constitution, requires that the plaintiff specifically allege a violation of the Constitution or an Act of Congress. The United States Supreme Court has held:

> Standing alone, Section 1983 clearly provides no protection for civil rights since, as we have just concluded Section 1983 does not provide any substantive rights at all. To be sure, it may be argued that section 1983 does in some sense provide for the protection of civil rights when it authorize a cause of action based upon the deprivation of civil rights guarenteed by other Acts of Congress.

Chapman v. Houston Welfare Rights Organization 441 U.S. 600, 618, 99 S. Ct. 1905, 60 L Ed. 2d 508 (1979).

Also relevant to the determination of the defendants' motions to dismiss is the rule that Section 1983 imposes liability only upon those who actually cause a deprivation of rights, and thus, the "personal involvement of each defendant in alleged constitutional deprivations" is a necessary element of a Section 1983 claim." Snider v. Dylag, 188

F. 3d 51 (2d Cir. 1999); Blyden v. Mancusi, 186 F. 3d 252, 264 (2d Cir. 1999) (citing Wright v. Smith, 21 F. 3d 496, 501 (2d Cir. 1994). This "personal involment" may take the form of dirct participation in the deprivation, a defendant's failure to remedy an alleged wrong after learning of it, the creation of a policy or custom of unconstitutional practices, or gross negligence in managing subordinates. See Black v. Coughlin, 76 F. 3d 72, 74 (2d Cir. 1996) (citing Wright 21 F. 3d at 501). It is within this framework that the Court examines the seven causes of action listed in the complaint and the five 12(b)(6) motions attacking them.

B. THE FIRST CAUSE OF ACTION

As a first cause of action, the plaintiff claims that he "was subject to a conspiracy to interfere with his civil rights" (complaint 71). Although the plaintiff does not specify in his complaint which subsection of section 1985 he believes is applicable, section 1985 (3) is the only relevant subsection given the factual allegations contained in the complaint. To succeed on a claim under section 1985 (3), a litagant must demonstrate, among other things, that he was a victim of a conspiracy "motivated by racial or related class-based animus." Graham v. Henderson, 89 F. 3d 75, 82 (2d Cir. 1996); see also Thomas v. Roach, 165 F. 3d 137, 146 (2d Cir. 1999). Here, the plaintiff does not complain that the alleged conspiracy was motivated by racial or class-based animus. As such, no set of facts would entitle the plaintiff to relief, and he, therefore fails to state a claim for conspiracy. See Thomas 165 F. 3d at 146; Graham 89 F.3d at 82. Accordindly, the

Court grants all five motions to dismiss the conspiracy cause of action.

In addition, to the extent that the plaintiff alleges a section 1985 cause of action against the remaining non-moving defendants, those conspiracy claims are dismissed as well. A distict court may dismiss a claim sua sponte when the action is frivilous. See Fitzgerald v. First East Seventh Tenants Corp., 221 F. 3d 362, 363 (2d Cir. 2000)(holding that distict courts may dismiss frivolous complaint sua sponte even when the plaintiff has paid the required filing fee). Indeed, " district courts are especially likely to be exposed to frivolous action and, thus, have a great need for inherent authority to dismiss such actions quickly in order to preserve scarce judicial resources." Id. at 364. A claim "is frivolous where it lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989). Here the plaintiff's conspiracy claims lack basis in law, because he has failed to allege a racial or class-based animus. See Thomas 165 F. 3d at 146; Graham, 89 F. 3d at 82. As such, the Court finds the plaintiff's conspiracy claims against the non-moving defendants are frivolous and dismisses those claims sua sponte. See Fitzgerals, 221 F. 3d at 363; Neitzke, 490 U.S. at 325. Thus, the first cause of action is dismissed in its entiretly.

Furthermore, to the extent that the complaint alleges claims pursuant to 42 U.S.C. 1986, those claims are dismissed as well, because a section 1986 claim must be predicated upon a valid section 1985 claim. See Graham, 89 F. 3d at 82 (2d Cir. 1996); Mian v. Donaldson, Lufkin & Jenrette Sec.

Corp., 7 F. 3d 1085, 1088 (2d Cir. 1993) (per curium) (a section 1986 claim must be predicated upon a valid section 1985 claim). As discussed above, the plaintiff does not have a valid section 1985 claim. Accordingly, he fails to state a section 1986 claim, see Graham, 89 F. 3d at 82; Mian, 7 F.3d at 1088 and the Court sua sponte dismisses these claims because they fail to state a basis in law. See Neitzke, 490 U.S. at 325; Fitzgerald, 221 F. 3d at 363.

C. THE SECOND CAUSE OF ACTION

In his second cause of action, the plaintiff contends that he "was subject to unwarranted search and seizure in violation of 42 U.S.C. 1983.... and the 4th Amendment of the Constitution" (complaint 73). With respect to plaintiff's allegation that he was subjected to an unwarranted search, the court finds that it must dismiss that claim sua sponte. The plaintiff uses the word "unwarranted search" under the headings for his second and sixth causes of action, but the complaint does not describe any search at all, much less an unwarranted one. Although the Federal Rules of civil Procedure require ony a " short and plain statement of the claim." Fed. R. Civ. P. 8(a), such a statement must "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 113 S. Ct. 1160, 1163 (1993) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

Rule 8(a) "is designed to permit the defendant to

have a fair understanding of what plaintiff is complaining about and to know whether there is a legal basis for recovery." Ricciuti v. New York City Transit Authority, 941 F.2d 119, 123-4 (2d Cir. 1991). Even in light of this liberal pleading standard and viewing the plaintiff's unwarranted search claim to raise the strongest argument it suggest, McPherson, 74 F. 3d at 280, the plaintiff's unwarranted search claim fails to give the defendants notice of the ground upon which the claim is based. See Leatherman, 113 S.Ct. at 1163; Ricciuti, 941 F. 2d at 123-4. As such, the claim lacks a basis both in law and fact, and the Court therefore dismisses it sua sponte. See Neitzke, 490 U.S. at 325; Fitzgerald, 221 F 3d at 363.

However, the second cause of action raises a Section 1983 false arrest claim and state law false arrest claim. See Weyant v. Okst, 101 F.3d 845, 852 (2d Cir. 1996)("A 1983 claim for false arrest rests on the Fourth Amendment right of an individual to be free from unreasonable seizures, including arrest without probablr cause.") To state a claim for false arrest, the plaintiff must show that: (1) the defendants intentionally confined the plaintiff; (2) the plaintiff was aware of the confinement; (3) the plaintiff did not consent to the confinement; and (4) the confinement was not justified or privileged. See Broughton v. New York, 37 N.Y. 2d 451, 456-7, 373 N.Y.S. 2d 87, 335 N.E. 2d 310 (1975); see also Post v. Doherty, 944 F. 2d 91, 97 (2d Cir. 1991).

The existence of probable cause is a complete defense to a false arrest claim, even where the plaintiff was ultimately acquitted of the criminal

charges. See Weyant, 101 F. 3d at 852 (citing Bernard v. Unites States, 25, F. 3d 98, 102 (2d Cir. 1994). Probable cause is presumend when the arrest is effected pursuant toa warrant issued by a neutral magistrate. See Golino v. City of New Haven, 950 F. 2d 864, 870 (2d. Cir. 1991). Probable cause is also presumed when a grand jury has handed down an indictment. See Bernard, 25 F. 3d at 104. In cases in which the presumption of probable cause arises from the issuance of an arrest warrant, the plaintiff overcomes the presumption by making "a substantial preliminary showing that the affiant knowingly and intentionally, or with reckless disregard for the truth, made a false statement in his affidavit and that the allegedly false statement was necessary to the finding of probable cause." See Golino, 905 F. 2d at 870 (quoting Franks v. Delaware, 438 U.S. 154, 155-6, 98 S.Ct. 2674, 57 L.Ed. 2d 666 (1978). In case in which the presumption of probable cause arises from an indictment, the plaintiff overcomes the presumption "by showing that the indictment was procured by fraud, perjury, the suppresssion of evidence or other police conduct undertaken in bad faith." Bernard, 25 F. 3d at 104; see also Green v. Montgomery, 219 F. 3d 52, 59 (2d Cir. 2000).

In this case the plaintiff claims that he was falsely arrested. However it appears from the complaint that the plaintiff was arrested pursuant to a warrant and was subsequently indicted by a Grand Jury. Thus, probable cause is presumed. See Bernard, 25 F. 3d at 104; Golino, 905 F. 2d at 870. Yet, the crux of the plaintiff's complaint is that the arrest warrant was invalid, because it was based

on Barrio's false statements. Similarly, the plaintiff contends that the indictment was invalid, because it was based on the allegedly false testimony provided of Molinelli, Flynn aand Barrio. Furthermore, the plaintiff claims that District Attorney Dillon, A.D. Quigley, A.D.A. Emmons, and A.D.A. Kornblau approved the perjury that led to his arrest, and that the County is liable for the conduct of its employees.

Postal Service defendant Doe, the Sunnydale defendants, the Atlantic defendants, and Zurich argue that the false arrest claim should be dismissed as against them because the plaintiff has failed to allege that they were directly and personally involved. The Court finds that the complaint does not contain allegations of these defendants' direct and personal involvement in the conduct that is the basis of the false arrest claim. Snider 188 F. 3d at 51; Blyden, 186 F. 3d at 264. In fact, the complaint barely mentions these defendants except to state that some of them attended a meeting or "participated in the conspiracy," or were in supervisory positions. Accordingly, those motions to dismiss the false arrest claim are granted.

The Court further finds that the complaint fails to contain allegations that the following defendants were directly and personally involved in the conduct that formed the basis for the false arrest claim: Algieri, Cats, Roberts, Farrell, Jaffer, Blessinger, CIGNA, and NICB. Accordingly, the Court sua sponte dismisses the false arrest claims as to those defendants as well. Snider, 188 F.3d at 51;

Blyden, 186 F. 3d at264. For sake of clarity, the Court notes that the false arrest claim and the Section1983 false arrest claim remain as to Kornblau, Dillon, Quigley, Emmons, Barrio, Molinelli, Flynn, the County of Nassau and the Postal service.

D. THE THIRD CAUSE OF ACTION

In his third cause of action, the plaintiff alleges that he "was subjected to malicious intention to find probable cause to indice, legal advise to commit perjury in sworn affidavit and Grand Jury testimony and malicious prosecution in violation of 42 U.S.C. 1983 (complaint 75). The Court construes this cause of action as one for malicious prosecution under state law and under Section 1983. The elements of a cause of action for malicious prosecution are " (1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding and (4) actual malice." Smith-Hunter v. Harvey, 95 N.Y. 2d 191, 712 N.Y.S. 2d 428, 440-41 (2000) (quoting Broughton v. State of New York. 37 N.Y. 2d 451, 457, 373, N.Y.S. 2d 87.

As with false arrest, a showing of probable cause will defeat the claim. However, the plaintiff's complaint cannot be dismissed on that ground, because as noted above, the validity of the probable cause was the basis of the arrest warrant and the legitimacy of the Grand Jury proceedings are the heart of the plaintiff's case. Thus for reasons

stated above (see supra II C. (explaining that a plaintiff may overcome the presumption of a probable cause that arises with the issuance of an arrest warrant or true bill by demonstrating that tyhe warrant was based on false statements of an affiant who demonstrates reckless disregard for the truth and the true bill was based on perjured testimony)), the Court finds the plaintiff has stated a claim for malicious prosecution.

However, the plaintiff has not stated a malicious prosecution claim against all the defendants. Postal Service defendant Doe, the Sunnydale defendants, the Atlantic defendants, and Zurich argue that the malicious prosecution claim should be dismissed as against them because the plaintiff has failed to allege that they were personally involved. Indeed, the complaint does not allege facts that even suggest that these defendants were directly or personally involved in the commencement or the continuation of the criminal proceedings. Accordingly, the Court grants their motions, and the malicious prosecution and Section 1983 malicious prosecution claims are dismissed as against Doe, the Sunnydale defendants, the Atlantic defendants and Zurich. Snider, 188 F. 3d at 51; Blyden, 186 F.3d at 264.

The Court further finds that the complaint fails to allege that the folowing defendants were directly and personally involved in commencing or continuing the criminal proceedings against the plaintiff; Farrell, Algieri Cats, Roberts, Jaffer, Blessinger, CIGNA, and NICB. Accordingly, the Court sua sponte dismisses the malicious

prosecution and Section 1983 malicious prosecution claims as to those defendants as well. Snider 188 F.3d at 51; Blyden, 186 F.3d at 264. For the sake of the clarity, the Court notes that the malicious prosecution and the Section 1983 malicious prosecution claims remain as to Kornblau, Dillon, Quigley, Emmons, Barrio, Molinelli, Flynn, the County of Nassau and the Postal Service.

E. THE FOURTH CAUSE OF ACTION

As a fourth cause of action, the plaintiff contends that he "was subjected under color of law to perjured testimony by law enforcement officers and a confidential informant under their control" (complaint 79). The plaintiff alleges two instances of perjury: (1) Barrio committed perjury in his affidavit in support of the warrant application; and (2) Barrio, Flynn and Molinelli provided perjured testimony to the Grand Jury. In this allegation that he is a victim of perjury, the plaintiff has not stated a cognizable cause of action under state law or Section 1983. Accordingly, the plaintiff's fourth cause of action is dismissed in its entirety.

F. THE FIFTH CAUSE OF ACTION

In his fifth cause of action, the plaintiff alleges that he "was subject to malicious falsehood in press conferences and releases." In particular, the plaintiff claims that on May 21, 1997, the date of his arrest, defendant Dilon, the District Attorney for Nassau County, and A.D.A. Kornblau, issued the following statement to Newsday: "Lehman, 64, a Wantagh orthopedist, is shown meeting with an

undercover operative who tells Lehman she was working despite being injured in an accident. You are not working as far as insurance is concerned, Lehman is heard telling the woman without performing a physical examination. Lehman gave the woman a disability form, Dillon said" (complaint 66). The doctor contends that this statyement was false, and that D.A.'s Office possessed tapes that support the doctor's contention. Under the title, "Sixth Cause of Action," the plaintiff contends that, as a reult of the defendants' actions, he suffered loss of liberty and the ability to earn a living.

Generally, defamation is not actionable under Section 1983. See Paul v. Davis, 424, U.S. 693, 701, 96 S.Ct. 1155, 1160-61, 47 L. Ed. 2d 405 (1976). However, a section 1983 claim may lie when the false and stigmatizing statements, made by government, are accompanied by a tangible injury to the victim of the statements. Id. The Second Circuit has interpeted Paul "as holding that stigma plus is required to establish a constitutional deprivation." Neu v. Corcoran, 869 F. 2d 662, 667 (2d Cir. (1989). A sullied reputation is insufficient for deprivation of a liberty interest. Valmonte v. Bane, 18 F.3d 991, 1001 (2d Cir. 1994). Rather, the plaintiff must also allege the "plus," which may be " significant damage to a person's employment opportunities or dismissal from a government job or deprivation of some othe legal right or status." Neu, 869 F.2d at 667.

Here, the plaintiff alleges that Dillon and Kornblau made a false statement that deprived the

the doctor of an ability to make a living, and that they were employees of the County, which had a a a custom or policy of violating constitutional rights. Thus, the plaintiff has stated a state law claim for defamation and a Section 1983 claim for foreclosure from employment by defamatory statements of a government employee. However, the plaintiff has only alleged these claims with repect to Dillon, Kornblau and the County, and does mention any of the other defendants in connection with the alllegedly defamatory statements. Because the complaint does not allege that defendants other than Dillon and Kornblau were directly and personally involved in making the allegedly defamatory statement that purpotedly deprived the doctor of an ability to make a living, The Court dismisses the fifth cause of action as against Quigley, Emmons, Barrio, Molinelli, Algieri, Cats, Flynn, Doe, Roberts, Jaffer, Farrell, Blessinger, Stasca, Atlantic, CIGNA, Zurich, NICB, Sunnydale, and the Postal Service.

G. THE SIXTH CAUSE OF ACTION

The sixth cause of action provides that the plaintiff was "subject to loss of liberty, loss of ability to earn a living, unwarranted search and to spend huge sums of money to defend himself in a criminal prosecution." Viewing this claim in the light most favorable to the plaintiff, the Court construes this claim it as a cause of action for entrapment. Although the substantive due process protection of the Fourteenth Amendment protects citizens from deprivation of life, liberty or property; governmental abuse; and unfairness

or oppression caused by official behavior, See Daniels v. Williams, 474 U.S. 327, 33031, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986), entrapment is not a constitutional offense, See DiBlasio v. City of New York, 102 F. 3d 654, 656-67 (2d Cir. 1996) (citing Hampton v. United States, 425 U.S. 484, 488-91, 96 S. Ct. 1646, 1649-51, 48 L. Ed. 2d 113 (1976) (plurality); cf. Lewis v. Meloni, 949 F. Supp. 158, 161-62 (w.D.N.Y. 1996) (holding that Section 1983 entrapment claim survives motion for summary judgement, because the plaintiff in essence, claimed that the police planted evidence on him.) "While entrapment may be a proper defense in a criminal action, a police officer's participation in such activity does not constitute a constitutional violation." Id. (quoting Jones v. Bombeck, 375 F.2d 737, 738 (3d Cir. 1967) (per curiam). Because entrapment is not a violation of the plaintiff's constitutional rights, it is not a cognizable cause of action under section 1983. See DiBlasio, 102 F.3d at 656-57. Accordingly, to the extent the plaintiff makes a section 1983 entrapment claim, the claim is dismissed as failing to state a basis in law. See Fitzgerald, 221 F. 3d at 363; Neitzke, 490 U.S. at 325.

H. SEVEVTH CAUSE OF ACTION

In his seventh cause of action, the plaintiff alleges that "defendants have acted under color of law pursuant to official policy on in conjunction with law enforcement officials in contravention of Plaintiff's constitutional and statutory rights as set forth, but not limited to, the Fourth and Fourteenth Amendments to the United states Constitution, as well as 42 U.S.C. Section 1983, 42 U.S.C. 1985

42 U.S.C. 1986 and 28 U.S.C. 1343 (complaint 83). This cause of action essentially repeats the claims in the first second and third causes of action, which are for conspiracy, false arrest and malicious prosecution respectively. Because the seventh cause of action fails to state a claim that is separate and distinct from other claims in the complaint, this cause of action is dismissed in its entirety.

I. IMMUNITY

County defendants Dillon, Kornblau, Emmons and Quigley move to dismiss the complaint on the ground that they are entitled to absolute prosecutorial immunit and, in any event, qualified immunity. The federal defendants claim that they are entitled to sovereign immunity and in any event, qualified immunity. The Sunnydale and Atlantic defendants move to dismiss the claim on the ground that they are entitled to immunity under New York Insurance Law Section 406.

Prior to addressing the claims of immunity, it is helpful to review which claims and defendants remain in the case. The Court has found that the plaintiff has stated the following claims: (1) as the second cause of action, a Section 1983 false arrest claim against Molinelli, Flynn, Barrio, Dillon, Quigley, Emmons, Kornblau, the County of Nassau and the Postal Service; (2) as the third cause of action, a Section 1983 malicious prosecution claim against Molinelli, Flynn, Barrio, Dillon, Quigley, Emmons, Kornblau, the County of Nassau and the Postal Service; and (3) as the fifth cause of action, a Section 1983 defamation claim against Dillon,

Kornblau, and the County of Nassau. Because the case against the insurance companies and their employees have been dismissed, it is unnecessary for the Court to address their assertions of immunity.

1. The Prosecutors

County defendants Dillon, Kornblau, Emmons and Quigley move to dismiss the complaint on the grounds that they are entitled to absolute immunity and, in any event, qualified immunity. "It is well settled that prosecutors perfoming prosecutorial activities that are "intimately associated with the judicial phase of the criminal process' are entitled to absolute immunity for an action for damages under Section 1983." Ying Jing Gan v. City of New York, 996, F.2d 522, 530 (2d Cir. 1993) (quoting Imbler v. Pachtman, 42 U.S. 409, 430, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976). The "judicial phase of the criminal process" encompasses not only the actual trial, but also all actions that a prosecutor takes "in preparation for the initiation of judicial proceedings..... and which occur in the course of his role as an advocate for the State." Kalina v. Fletcher, 522 U.S. 118,____, 118 S. Ct. 502, 508, 139 L.Ed. 2d 471 (1997).

Thus, protected prosecutorial conduct includes deciding which charges to bring against a defendant, see Ying Jing Gan. 996 F. 2d at 530, the presentation of evidence to a grand jurfy, see Barrett v. United States, 798 F. 2d 565, 571-72 (2d Cir. 1986) and the preparation of witnesses and evidence for trial. See Kalina, 522 U.S. at _____,

118 S. Ct. at 507-08. However, prosecutors do not have absolute immunity for actions taken outside the prosecutor's role as an advocate. See Dory v. Ryan, 25 F. 3d 81, 82 (2d Cir. 1994); Barbera v. Smith, 836 F. 2d 96, 100 (2d. Cir. 1987).
" Thus, when a prosecutor supervises, conducts or assists in the investigation of a crime, or gives advise as to the existence of probable cause to make a warrantless arrest - that is, when he performs functions normally associated with a police investigation - he loses his absolute protection from liability." Richards v. City of New York, 1998 WL 567842 *2 (S.D.N.Y.) (citing Burns v. Reed, 500 U.S. 478, 493, 111 S.Ct. 1934, 114 L.Ed. 2d 547 (1991).

Here the complaint essentially alleges that the prosecutors planned a sting operation, suborned the perjury that led to the arrest warrant and the indictment and made false statements to the press. Save the allegations with respect to the prosecutors' presentation to the Grand jury, all of the prosecutors' challenged activities are investigative or administrative activities for which only qualified immunity is available. See Liffiton v. Keuker, 850 F. 2d 73, 76 (2d Cir. 1988). Thus Quigley, Dillon and Kornblau are entitled to absolute immunity for the presentation of evidence in the Grand Jury. See Barrett, 798 F. 2d at 571-72.

Qualified immunity applies to the discretionary functions of state officials if their conduct does not violate "clearly established" statutory or constitutional rights of which "a reasonable person would have known." See Harlow v. Fitzgerald 457 U.S. 800, 817-18, 102 S.Ct. 2727, 73 L.Ed.2d 396

(1982). Thus "public officials are entitled to qualified immunity if (1) Their conduct does not violate clearly established constitutional rights, or (2) it was objectively reasonable for them to believe their acts did not violate those rights." Weyant, 101 F.3d at 857 (citing Anderson v. Creighton, 483, U.S. 635, 638-9, 107 S. Ct. 3034, 3038-39, 97 L.Ed. 2d 523 (1987)). Here, the Court finds that neither the plaintiff nor the defendants Quigley, Dillon and Kornblau has provided the Court with sufficient detail regarding the defendants' alleged conduct for the Court to properly decide "whether a reasonable officer could have believed his actions to be lawful, in light of clearly established law and the information he possesses." Id. (citing Anderson, 483 U.S. at 641, 107 S. Ct. at 3039-40); see generally Pani v. Empire Blue Cross Blue Shield, 152 F. 2d 67, 74 (2d Cir. 1998) (holding that affirmative defense such as qualified immunity may be decided on 12(b)(6) motion to dismiss the complaint if the defense appears on the face of the complaint). Accordingly, the defendants' motion to dismiss the complaint is denied with leave to renew at the completion of discovery.

2. The Postal Service Defendants

The remaining Postal Service defendants, Flynn and the Postal Service, claim that they are entitled to soverign and qualified immunity. The plaintiff's claim for damages against Flynn in her official capacity and the Postal Service are essentially claims against the United States and will be barred by doctrine of sovereign immunity unless the plaintiff can demonstrate that Congress has

unequivivocally waived the immunity of the United States. See Keene Corp. v. United States, 700 F. 2d 836, 840-41, 845 n. 13 (2d Cir. 1983). Here, the plaintiff could rely on the Federal Tort Claims Act ("FTCA), 28 U.S.C. 2671, et seq. which allows the United States to be sued for damages aring out of tortious acts of federal employees within the scope of their employment, 28 U.S.C. 2679(b), provided that the tortious acts are within the scope of the statue, 28 U.S.C. 2679,2680, and that the plaintiff has exhausted his administrative remedies, 28 U.S.C. 2675. Here neither the plaintiff nor the defendant addresses the requirements of the FTCA.

The plaintiff also seeks damages against Flynn in her individual capacity for alleged violations of his constitutional rights under 42 U.S.C. 1983, which is limited to state actors and does not apply to federal employees. However, because the plaintiff is proceeding pro se, the Court will construe his Section 1983 civil rights claim as the analagous claim applicable to federal actors under Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971). See Robinson v. Overseas Military Sales Corp. 21 F.3d 502, 510 (2d Cir. 1994); Liffiton v. Keuker, 850 F. 2d 73, 78 (2d Cir. 1988) (finding that Section 1983 actions against federal defendants in the individual capacity may be entertained as a Bivens action which is not barred by sovereign immunity); Daloia v. Rose, 849 F.2d 74,75 (2d Cir. 1988) (construing pro se Section 1983 action as Bivens action against federal defendants).

"It is axiomatic that sovereign immunity will

not bar a Bivens action against a federal official in his individual capacity, Liffiton v. Keuker, 850 F. 2d 73, 78 (2d Cir. 1988), unless the federal action demonstrates that Bivens should not be extended to provide damages for a particular constitutional violation because special factors counsel hesitation in judicially creating a remedy in absence of affirmative action of Congress" or because Congress has created an equally effective, alternative remedy, such as the FTCA." Robinson v. Overseas Military Corp., 827 F. Supp. 915, 925 (E.D.N.Y. 1993). Again, neither the plaintiff nor the Postal Service defendants have addressed this issue. The Court finds that it has not been presented with the facts necessary to decide the question of sovereign immunity at this stage of the litigation. Accordingly, The Court denies the motion to dismiss the complaint on the grounds of sovereign immunity with leave to renew at the completion of discovery.

Turning to Flynn's claim that she is entitled to qualified immunity for the claims brought against her in her individual capacity, the Court is constrained to deny Flynn's motion at this stage of the litigation. As with the County defendants, neither party has provided the Court with details necessary to determine whether Flynn was performing a discretionary function and, if so, whether her conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. 800, 818 (1982); See Zahrey v. Coffey, 221 F.3d 342, 347 (2d Cir. 2000). Accordingly,

Flynn's motion to dismiss on the ground of qualified immunity is denied with leave to renew at the completion of discovery See Pani 152 F.2d at 74.

III. CONCLUSION

Having reviewed the parties submissions, it is hereby

ORDERED that the motions by the County defendants and the Postal Service defendants to dismiss the complaint are GRANTED in part, and DENIED in part; and itis further

ORDERED, that the motions by the Sunnydale defendants, Zurich and the Atlantic defendants to dismiss the complaint are GRANTED, and it is further

ORDERED, that the first cause of action is dismissed in its entirety, and it is further

ORDERED, that the second cause of action is dismissed as to defendants Doe, Sunnydale, Stasca, Farrell, Zurich, Algieri, Cats, Atlantic, Robert, Jaffer, Blessinger, CIGNA and NICB; and it is further

ORDERED, that the third cause of action is dismissed as to Doe, Sunnydale, Stasca, Farrell, Zurich, Algieri, Cats, Atlantic, Roberts, Jaffer, Blessinger, CIGNA and NICB; and it is further

ORDERED that the fourth cause of action be dismissed in its entirety; and it is further

ORDERED, that the fifth cause of action is dismissed as to Quigley, Emmons, Barrio, Molinelli, Algieri, Cats, Flynn, Doe, Roberts, Jaffer, Farrell, Blessinger, Stasca, Atlantic, CIGNA, Zurich, NICB, Sunnydale and the Postal Service; and it is further

ORDERED, that the sixth cause of action is dismissed in its entirety; and it is further

ORDERED, that the seventh cause of action is dismissed in its entirety; and it is further

ORDERED, that the remaining defendants are directed to serve and file answers on or before March 29, 2001, and it is further

ORDERED, that the parties are to report to United States Magistrate Judge William D. Wall to proceed with discovery forthwith,

ORDERED, that the Clerk of the Court is to amend the caption to read as follows:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

MARTIN A. LEHMAN,

Plaintiff,

-against-

BARBARA A. KORNBLAU, individually and in her official capacity as an Assistant District Attorney of Nassau County, DENIS E. DILLON, individually and in his official capacity as District Attorney of Nassau County, FRANCIS D. QUIGLEY, individually and in his official capacity in the Nassau County District Attorney's Office, ROBERT L. EMMONS, individually and in his official capacity in the Nassau County District Attorney's Office, RODOLFO BARRIO, individually and in his official capacity as a Nassau County Police Officer, JOSEPH MOLINELLI, MARY FLYNN, COUNTY OF NASSAU, and UNITES STATES POSTAL SERVICE,

Defendants,

----------X

SO ORDERED

Dated: Central Isclip, New York
March 8, 2001

"S/_____".
ARTHUR D. SPATT
United States District Judge